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Nos. 87-1321 and 87-1368

In the Supreme Court of the United States

OCTOBER TERM, 1987

LOMBARDFIN S.p.A. AND PAOLO MARIO LEATI, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

TRASATLANTIC FINANCIAL CO., S.A., ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether publication of a Summons with Notice, as ordered by the district court, is authorized by Fed. R. Civ. P. 4, and is constitutionally sufficient where petitioners received actual notice of the lawsuit but elected not to appear.

2. Whether the purchase of securities of a target corporation while in possession of material nonpublic information regarding an imminent tender offer, misappropriated from the tender offeror in breach of a fiduciary duty, constitutes conduct "in connection with the purchase or sale of * * * securit[ies]" within the meaning of the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and SEC Rule 10b-5, 17 C.F.R. 240.10b-5.

3. Whether a district court may order the disgorgement of illegal trading profits in an injunctive action brought by the Securities and Exchange Commission.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) 17
Affiliated Ute Citizens v. *United States*, 406 U.S. 128 (1972) 18
Bateman Eichler, Hill Richards, Inc. v. *Berner*, 472 U.S. 299 (1985) 19
Carpenter v. *United States*, No. 86-422 (Nov. 16, 1987) .. 17, 18
Conforte v. *Commissioner*, 692 F.2d 587 (9th Cir. 1982), stay denied, 459 U.S. 1309 (1983) 16
Dirks v. *SEC*, 463 U.S. 646 (1983) 19
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 18
Herman & MacLean v. *Huddleston*, 459 U.S. 375 (1983) 18, 21
International Controls Corp. v. *Vesco*, 593 F.2d 166 (2d Cir.), cert. denied, 442 U.S. 941 (1979) 10
Mennonite Bd. of Missions v. *Adams*, 462 U.S. 791 (1983) 12
Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) 21
Molinaro v. *New Jersey*, 396 U.S. 365 (1970) 16
Moss v. *Morgan Stanley, Inc.*, 719 F.2d 5 (2d Cir. 1983), cert. denied, 465 U.S. 1025 (1984) 20
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 8, 12, 13
Nagle v. *Lee*, 807 F.2d 435 (5th Cir. 1987) 13
National Equipment Rental, Ltd. v. *Szukhent*, 375 U.S. 311 (1964) 14
Omni Capital Int'l, Ltd. v. *Rudolf Wolff & Co.*, No. 86-740 (Dec. 8, 1987) 10
Randall v. *Loftsgaarden*, No. 85-519 (July 2, 1986) 21
Schroeder v. *City of New York*, 371 U.S. 208 (1962) 12, 13
SEC v. *Blatt*, 583 F.2d 1325 (5th Cir. 1978) 19, 20

Cases—Continued: Page

SEC v. *Blavin*, 760 F.2d 706 (6th Cir. 1985) 19, 20-21
SEC v. *Certain Unknown Purchasers*, No. 81 Civ. 6553 (S.D.N.Y. Feb. 26, 1986), aff'd, 817 F.2d 1018 (2d Cir. 1987), cert. denied, No. 87-769 (Feb. 22, 1988) 14
SEC v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90 (2d Cir. 1978) 19
SEC v. *Materia*, 745 F.2d 197 (2d Cir. 1984), cert. denied, 471 U.S. 1053 (1985) 18
SEC v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir.), cert. denied, 404 U.S. 1005 (1971) 19-20
SEC v. *Wencke*, 783 F.2d 829 (9th Cir. 1986), cert. denied, No. 85-1896 (Oct. 6, 1986) 19, 20
Superintendent of Insurance v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971) 19
Tull v. *United States*, No. 85-1259 (Apr. 28, 1987) 21
United States v. *$45,940 in United States Currency*, 739 F.2d 792 (2d Cir. 1984) 16
United States v. *Lovasco*, 431 U.S. 783 (1977) 11, 17
United States v. *Naftalin*, 441 U.S. 768 (1979) 18
United States v. *Newman*, 664 F.2d 12 (2d Cir. 1981), aff'd after remand, 722 F.2d 729 (2d Cir.), cert. denied, 464 U.S. 863 (1983) 18
United States v. *Parkinson*, 240 F.2d 918 (9th Cir. 1956) 20
United States v. *Sharpe*, 470 U.S. 675 (1985) 16
Volkswagenwerk Aktiengesellschaft v. *Schlunk*, cert. granted, No. 86-1052 (Oct. 13, 1987) 11
Walker v. *City of Hutchinson*, 352 U.S. 112 (1956) 12

Constitution, treaty, statutes, regulations and rules:

U.S. Const. Amend. VII 21
Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, *done* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 11
Art. 1, 20 U.S.T. 362 11
Clean Water Act, 33 U.S.C. 1251 *et seq.* 21
Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264 19

Statutes, regulations and rules -- Continued: Page

Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:
§ 2, 15 U.S.C. 78b 21
§ 10(b), 15 U.S.C. 78j(b) 2, 6, 16, 18, 19, 20
§ 14(e), 15 U.S.C. 78n(e) 2, 20
§ 27, 15 U.S.C. 78aa 10, 11

17 C.F.R.:
Section 240.10b-5 ..... 2, 6, 16, 18, 19, 20
Section 240.14e-3 ..... 2, 20

Fed. R. Civ. P.:
Rule 4 ..... 5, 9, 10
Rule 4(e) 10, 11
Rule 4(i)(1)(E) 10
Rule 60(b) 16

Miscellaneous:

H.R. Rep. 98-355, 98th Cong., 1st Sess. (1983) 19, 21

Memorandum of Understanding Between the United States and Switzerland to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading, 22 I.L.M. 1 (1982) 15

Memorandum of Understanding Between the United States Securities and Exchange Commission and the Ontario Securities Commission, the Commission des Valeurs Mobiliers du Quebec, and the British Columbia Securities Commission (Jan. 7, 1988) 15

Memorandum of Understanding Between the United States Securities and Exchange Commission and the Securities Bureau of the Japanese Ministry of Finance on the Sharing of Information (May 23, 1986) 15

Memorandum of Understanding on Exchange of Information Between the United States Securities and Exchange Commission and the United Kingdom Department of Trade and Industry in Matters Relating to Securities and Between the United States Commodity Futures Trading Commission and the United Kingdom Department of Trade and Industry in Matters Relating to Futures (Sept. 23, 1986) 15

Restatement (Second) of Judgments (1982) 13

S. Rep. 792, 73d Cong., 2d Sess. (1934) 18-19

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 833 F.2d 1086.[1] The opinions of the district court (Pet. App. A25-A100) are reported at 638 F. Supp. 596, 629, and 638.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1987. The petition for a writ of certiorari in No. 87-1321 was filed on February 8, 1988, and the peti-

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[1] References to "Pet. App." are to the appendix to the petition in No. 87-1321.

tion in No. 87-1368 was filed on February 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Southern District of New York, petitioners were found to have violated antifraud provisions of the federal securities laws by trading in the securities of a target corporation, one day before the public announcement of a tender offer, while in possession of material nonpublic information misappropriated from the tender offeror. The district court permanently enjoined petitioners from violating Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), and SEC Rule 10b-5, 17 C.F.R. 240.10b-5, and, to the extent coextensive, Section 14(e) of the Exchange Act, 15 U.S.C. 78n(e), and SEC Rule 14e-3, 17 C.F.R. 240.14e-3. Petitioners were also ordered to disgorge nearly $3 million in illegal profits. The court of appeals affirmed (Pet. App. A1-A24).

1. The evidence at trial showed that petitioners participated in an international securities trading scheme orchestrated by defendant Giuseppe Tome, an Italian securities professional residing in Switzerland who is presently a fugitive from United States justice (Pet. App. A27-A29, A81). Having actively cultivated a personal and professional relationship of trust and confidence with Joseph E. Seagram & Co. and Edgar Bronfman, Seagram's chairman and chief executive officer (*id.* at A5-A6, A26, A33-A35), Tome obtained advance knowledge that Seagram was about to make a tender offer for the stock of St. Joe Minerals Corp. (*id.* at A41). Early on the morning of March 10, 1981—one day before the public announce-

ment of the tender offer caused the price of St. Joe stock to jump from $30 to more than $45 per share (*id.* at A26)—Tome "feverishly" (*id.* at A7) placed orders from New York for the purchase in the United States of massive quantities of St. Joe securities.

In particular, acting on behalf of petitioners in No. 87-1368—Panamanian corporations that Tome owned and over which he exercised discretionary trading authority—Tome directed defendant Banca della Svizzera Italiana ("BSI") in Lugano, Switzerland, to purchase St. Joe call options (Pet. App. A31-A32).[2] Tome also placed numerous telephone calls to individuals at other Swiss banks and foreign financial institutions; immediately thereafter, each of those persons likewise purchased large amounts of St. Joe securities (*id.* at A44-A47). Tome and his tippees dominated the market in St. Joe securities the day before the tender offer, accounting for 33 percent of all St. Joe options purchased, as well as more than 10 percent of all St. Joe stock purchased on the New York Stock Exchange (*id.* at A48).

Among Tome's tippees was Paolo Mario Leati, a petitioner in No. 87-1321. Leati, an Italian national, is the manager and majority owner of co-petitioner Lombardfin, S.p.A., a brokerage firm registered with the SEC, with offices in Milan and Rome, and which shared offices with Tome's firm in Geneva. Pet. App. A5, A30-A31, A56. The evidence showed that Tome placed a telephone call to Leati on March 10 and advised him that Seagram would be making a tender offer for St. Joe "in the next few days" (*id.* at A56-A57, A73). Two minutes later, Leati, who had never before purchased St. Joe securities, bought nearly $1.4 million worth of St. Joe securities for accounts

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[2] The court of appeals concluded (Pet. App. A21) that the Panamanian corporations were Tome's alter egos.

of Lombardfin customers over which he exercised discretionary trading authority (*id.* at A45). Leati had long-standing business and social ties to Tome (*id.* at A5, A90-A91), and he immediately credited Tome's tip because he knew that Tome had a close relationship to Seagram (*id.* at A9). In return for the information, Leati agreed to pay Tome $200,000 out of his share of any profits (*id.* at A22, A56-A57). Leati subsequently admitted at a meeting of Lombardfin's board of directors that Lombardfin's St. Joe trades "obviously" violated the United States securities laws (*id.* at A22-A23).

2. On March 27, 1981, the respondent, the Securities and Exchange Commission, commenced a civil enforcement action arising out of the March 10 trading in St. Joe securities (Pet. App. A10). At that time, the Commission did not know who was responsible for the massive St. Joe purchases, since the trades had been effected through BSI, in accounts shrouded by bank secrecy laws (*id.* at A12). The Commission accordingly named as defendants in its complaint only BSI, Irving Trust Company (where BSI had deposited certain of the proceeds of the trades), and "Certain Purchasers" of St. Joe securities (*id.* at A12, A51-A52).

It was not until November 1981—after the district court had directed BSI, on penalty of contempt, to identify the principals behind the trades—that the Commission learned of the identities of Tome and the petitioning Panamanian corporations (Pet. App. A12). The Commission accordingly amended its complaint in December 1981 to include those defendants by name (*ibid.*). The Commission amended the complaint a second time on May 13, 1982, to expand the category of "certain purchasers" to include Tome's tippees (*id.* at A13)—including, more specifically, those persons who had effected St. Joe transactions through accounts at Lombardfin. Although the

Commission knew at that time that there had been illegal trading through the Lombardfin accounts, it did not know that petitioners Leati and Lombardfin were culpable, and accordingly the Commission did not identify them by name as defendants.

The Commission's failure to learn of Leati's and Lombardfin's culpability was due to the fact that those petitioners had furnished false and misleading information to the Commission in connection with its investigation of this matter (Pet. App. A12-A13). Petitioners submitted false trading records that erroneously stated that Lombardfin's St. Joe purchases were "unsolicited"—that is, effected at the request of its customers, and not at Leati's instance (*id.* at A13). Moreover, Leati provided the Commission with an affidavit in which he falsely asserted that he had not traded on the basis of nonpublic information (*id.* at A12-A13).

In light of the difficulties in ascertaining the identities of the St. Joe purchasers, the Commission moved for an order, pursuant to Fed. R. Civ. P. 4, to permit service on the unknown purchasers by publication (Pet. App. A13). The district court granted the motion, and a Summons with Notice was published once a week for four consecutive weeks, in May and June 1982, in the *International Herald Tribune*, a newspaper widely read by the international financial community in Europe (see Pet. App. A14-A15, A73).

In October 1985 the Commission learned through discovery that Leati and Lombardfin were among the unknown persons who had traded illegally in St. Joe securities. Based upon that new knowledge, the Commission, shortly before trial was scheduled to commence, sought to amend the second amended complaint to identify Leati and Lombardfin, by name, as defendants. On October 17, 1985, at the Commission's request, the district

court issued an order to show cause to that effect; a member of the Italian bar personally delivered that order to petitioners on October 18 at the Lombardfin office in Milan. Pet. App. A15. At a hearing on the motion on October 23, 1985, at which Leati and Lombardfin did not appear, the district court held that the 1982 service by publication—coupled with evidence in the record showing that Leati and Lombardfin "clearly were aware of the pendency of this litigation but chose not to participate in it"—satisfied notice and service requirements (*id.* at A73). The district court also determined that, because Leati and Lombardfin had previously been charged as unknown defendants in 1982, the substitution of their names in the complaint was not a substantive amendment that required the Commission to re-serve the complaint (*id.* at A16). Accordingly, the court ordered that the caption of the complaint be modified so as to identify Leati and Lombardfin by name as among the "Certain Purchasers" charged as defendants (*id.* at A73).

3. Following trial, the district court held that petitioners had violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder; it ordered disgorgement of petitioners' illegal profits; and it issued a permanent injunction against future violations of the antifraud provisions (Pet. App. A25-A82). The court found, first (*id.* at A69), that Tome had "traded and tipped on the confidential inside information he received from Seagram and Bronfman about St. Joe, in breach of his fiduciary duty to Seagram, its shareholders, and Bronfman." The court noted, moreover (*id.* at A72), that the Panamanian corporations were "equally liable for Tome's violations of Section 10(b) and Rule 10b-5," noting (*ibid.*) that those corporations had conceded that Tome had been acting as their agent in making the St. Joe purchases. The court also found (*id.* at A72-A75) that Leati and Lombardfin, who

did not appear in the district court, were liable as Tome's tippees. It explained (*id.* at A73) that Leati "knew or should have known that Tome's disclosures to him were made in breach of Tome's fiduciary or similar duty of trust and confidence to Seagram, its shareholders, and Bronfman." And it added (*id.* at A74) that Lombardfin was liable as well, in that Leati, the company's "founder, majority stockholder, vice-chairman of the Board of Directors, and general manager," had acted illegally and had done so as Lombardfin's agent. The court permanently enjoined petitioners from committing future violations of the antifraud provisions of the federal securities laws (*id.* at A80-A82), and it ordered them to disgorge their illegal profits and to pay prejudgment interest (*id.* at A77-A80, A101-A104).[3]

4. The court of appeals affirmed (Pet. App. A1-A24).[4] In pertinent part, the court rejected (*id.* at A12-A20) the claim, made for the first time on appeal (*id.* at A19), that the district court lacked jurisdiction over petitioners Leati and Lombardfin. The court held (*id.* at A17) that "[p]ublication * * * in the *International Herald Tribune*

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[3] Leati and Lombardfin were ordered to disgorge more than $1.3 million in illegal profits (plus nearly $650,000 in interest). The Panamanian corporations were ordered to disgorge more than $1.4 million in illegal profits (plus nearly $700,000 in interest). The district court ordered defendant BSI to pay into the registry of the court $2 million (which represented most of the Panamanian corporations' illegal profits, including interest) that had been frozen in BSI's account at Irving Trust at the outset of the case. BSI satisfied the judgment against it on November 18, 1986, and did not appeal. Pet. App. A101-A103.

[4] The court of appeals dismissed Tome's appeal on November 25, 1986, because he was (and remains) a fugitive from justice in a related criminal proceeding (Pet. App. A4 n.1). The court declined, however, to dismiss the appeal of Tome's alter ego corporations, the petitioning Panamanian corporations (*ibid.*).

was 'reasonably calculated' to notify the unidentified purchasers of St. Joe options, including Leati and Lombardfin," and thus satisfied the requirements of *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The court added, moreover, that there was "no doubt" that well before trial Leati and Lombardfin had known of the suit brought by the Commission and the nature of the claims against them (Pet. App. A17-A18), but that petitioners had made a "conscious decision to ignore this action until after a judgment had been rendered against them" (*id.* at A20). And the court rejected the contention (*id.* at A19) that the Commission should have used a different means of serving process on the ground that it knew petitioners' names and addresses. The court explained (*ibid.*) that "Leati's affidavit and the misleading trading records deceived the Commission into believing that they were not involved in Tome's scheme."[5] Finally, the court of appeals rejected (*id.* at A23-A24) petitioners' contention that the district court lacked the power to order the disgorgement of illegal profits. The court explained that the district court had properly exercised its equitable power to "make sure that wrongdoers will not profit from their wrongdoing" (*id.* at A24).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

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[5] The Commission had moved to supplement the record on appeal to show that Leati and Lombardfin, in addition to being aware of the proceedings, had actually received in May 1982 a copy of the published Summons with Notice appearing that month in the *International Herald Tribune*. A copy of that notice had been found in Lombardfin's files in Italy. See C.A. SEC Supp. App. 16-22. Because

1. Petitioners Leati and Lombardfin contend (87-1321 Pet. 8-22) that the district court lacked personal jurisdiction over them. That claim does not warrant further review. As the court of appeals held (Pet. App. A12-A20), jurisdiction was properly exercised: the Commission secured a court order under Fed. R. Civ. P. 4 to proceed by publication abroad, and that method of service was "reasonably calculated" to apprise petitioners of the pendency of the action and to afford them, had they wished it, an opportunity to be heard. Moreover, the issue is not an appropriate one for this Court's review. There is no circuit conflict, and the issue is unlikely to recur. The events that required the Commission to name unknown persons as defendants and thereafter to publish notice of its complaint in an international newspaper were highly unusual, and the likelihood of their ever recurring should be significantly reduced by recently negotiated memoranda of understanding with certain foreign governments concerning access to securities-related information. Finally, even if the issue otherwise deserved further review, the present case is an inappropriate vehicle for doing so. There is compelling evidence, which petitioners have not contested, that Leati and Lombardfin received an actual copy of the Summons with Notice shortly after its publication, and thus, in any event, petitioners are not ultimately entitled to prevail on the merits of their constitutional challenge to the service of process.

a. Petitioners contend (87-1321 Pet. 13-21)--in a claim never raised below--that the district court lacked the statutory authority to order service by publication in this case. That contention is mistaken. In ordering the Commission to serve petitioners with a Summons with Notice

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it disposed of the jurisdictional issue on other grounds, the court of appeals denied the Commission's motion (Pet. App. A18 n.6).

by publication in the *International Herald Tribune*, the district court acted pursuant to Fed. R. Civ. P. 4 (Pet. App. A73), which authorizes that method of service in the present circumstances. Rule 4(e) provides, in pertinent part, that "[w]henever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice * * * upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order * * *." Section 27 of the Exchange Act, 15 U.S.C. 78aa, permits worldwide service of process, and thus it constitutes, for purposes of Rule 4(e), a statute of the United States that provides for service upon a party outside the state. Cf. *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, No. 86-740 (Dec. 8, 1987), slip op. 10. Section 27 does not, however, specify or in any way limit the manner of service. See *International Controls Corp.* v. *Vesco*, 593 F.2d 166, 175 (2d Cir.), cert. denied, 442 U.S. 941 (1979). Thus, pursuant to Rule 4(e), the district court was authorized to permit service to be effected "in the manner prescribed by * * * order."[6]

Petitioners contend (87-1321 Pet. 14-15, 18) that Section 27 implicitly forbids service by publication, and alternatively that since Section 27 does not expressly provide for service by publication, Rule 4(e) does not apply. No court has so held, and neither contention is correct. First, petitioners misread Section 27. By its terms, that provision

[6] Service by publication could also have been made under Fed. R. Civ. P. 4(i)(1)(E). That rule provides, in pertinent part, that when a federal law (like Section 27) authorizes service on a party overseas, the service of a summons and complaint may be effected "as directed by order of the court." Although, as petitioners point out (87-1321 Pet. 16), the publication in the newspaper did not include the complaint, the Summons with Notice incorporated all of the essential elements of the complaint (see Pet. App. 108a-109a).

simply states that in actions to enforce any liability under the Exchange Act, process may be served "wherever the defendant may be found" (15 U.S.C. 78aa). Section 27 does no more than authorize world-wide service of process; it does not dictate how that process may be effected, and certainly does not *forbid* service by publication. Second, Rule 4(e) does not require that the relevant federal statute expressly specify the means of service. To the contrary, we think the best reading of the rule is the one the district court reached: that where the statute authorizes service, but does not "prescrib[e] * * * the manner of service," the court may do so by its own order thereunder.[7]

b. Petitioners challenge (87-1321 Pet. 8-13) the constitutionality of service by publication in this case, claiming (*id.* at 8) that "notice by publication to unidentified persons whose names and addresses are known is constitutionally impermissible to establish *in personam* jurisdic-

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[7] Petitioners' reliance (87-1321 Pet. 18-21) on the Hague Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, *done* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163, is misplaced. First, petitioners did not raise that issue in the court of appeals and may not do so for the first time in this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, Article 1 of the Convention, 20 U.S.T. 362, expressly states that "[this] Convention shall not apply where the address of the person to be served with the document is not known"—precisely the situation here (see Pet. App. A13-A15). Moreover, the Convention does not expressly prescribe mandatory means for a government agency, such as the Commission, to serve process. See U.S. Amicus Br. at 12 n.11, *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, cert. granted, No. 86-1052 (Oct. 13, 1987), copies of which have been served on the parties in the present case. Whether the Convention should nonetheless be construed to require its use by government agencies is a novel question that should not be decided in the absence of rulings by lower federal courts.

tion." But petitioners beg the question. The district court (Pet. App. A73), affirmed by the court of appeals (*id.* at A13-A17), found that the Commission did *not* know of petitioners' part in the illegal transactions until late in 1985, when for the first time petitioners' role in the fraud was disclosed. As the court of appeals noted (*id.* at A19), the Commission could not have identified petitioners among the unknown purchasers because "Leati's affidavit and misleading trading records deceived the Commission into believing that they were not involved in Tome's scheme."

For that very reason, petitioners' reliance (87-1321 Pet. 11-12) on this Court's decisions in *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791 (1983), and *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), is misplaced. In each of those cases, the Court rejected publication as a means of notice because personal service or mailed notice was a readily available alternative. See *Mennonite Bd.*, 462 U.S. at 798 (personal or mailed notice is required where "the mortgagee is identified in a mortgage that is publicly recorded"); *Mullane*, 339 U.S. at 318 ("Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.").[8] Where, on the other hand, the names and addresses of the affected parties "are either

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[8] See also *Schroeder* v. *City of New York*, 371 U.S. 208 (1962) (publication in a newspaper and posted notices were inadequate to apprise a property owner of condemnation proceedings when his name and address were readily ascertainable from both deed records and tax rolls); *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956) (notice of condemnation proceeding published in a local newspaper was an inadequate means of informing a landowner whose name was known to the city and was on official records). As the Court put the matter in *Schroeder*, "[t]he general rule that emerges from the *Mullane* case is

conjectural" or "do not in due course of business come to knowledge" (*Mullane*, 339 U.S. at 317), the Court has not found service by publication to be insufficient. Indeed, the Court explained in *Mullane* that it "has not hesitated to approve of resort to publication as a customary substitute * * * where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Ibid.*[9]

In the present case, publication in the *International Herald Tribune* was hardly a "futile means of notification." To the contrary, as the court of appeals explained (Pet. App. A17), "[t]he SEC reasonably concluded that the purchasers resided or conducted business in Europe and chose a publication likely to be read by international investors." Moreover, the court observed (*ibid.*), "[t]he propriety of this method of notice must also be considered in light of the fact that members of the securities industry like Leati and Lombardfin may be expected to be

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that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable" (371 U.S. at 212-213).

[9] The Fifth Circuit's decision in *Nagle* v. *Lee*, 807 F.2d 435 (1987), is not to the contrary. The court of appeals held in that case that "the mere naming of a person through use of a fictitious name does not make that person a party absent voluntary appearance or proper service of process" (*id.* at 440). The court recognized, however, that a party may be summoned with fictitious names where " 'the summons and complaint or other notice of the proceedings [furnishes] a reasonable apprisal that the action concerns him.' " *Ibid.* (quoting Restatement (Second) of Judgments § 34 comment d (1982)).

aware of a publicly announced SEC investigation involving insider trading during a high-visibility takeover." And as the district court (*id.* at A73), affirmed by the court of appeals (*id.* at A17-A20), found, petitioners Leati and Lombardfin did indeed learn of the pendency of the lawsuit, well in advance of the date of trial. But although they were given the opportunity to be heard, petitioners "made a conscious decision to ignore this action until after a judgment had been rendered against them" (*id.* at A20).[10] On the record before the district court, there is no question that petitioners received constitutionally sufficient notice of this action. See *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 315 (1964).

c. Petitioners' challenge to the service of process in this case does not warrant further review for the additional reason that it is unlikely that the Commission will in the future be obliged to resort to similar means of serving process. The Commission has on only one other occasion, also in 1981, commenced an action and sought to publish notice under circumstances like those in this case. See *SEC* v. *Certain Unknown Purchasers*, No. 81 Civ. 6553 (S.D.N.Y. Feb. 26, 1986), aff'd on other grounds, 817 F.2d 1018 (2d Cir. 1987), cert. denied, No. 87-769 (Feb. 22, 1988). Moreover, the Commission has recently negotiated memoranda of understanding with the Swiss gov-

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[10] Indeed, it was petitioners' persistent evasions and misrepresentations that prevented the Commission from discovering at an earlier date that petitioners were involved in the fraud. As the court of appeals noted (Pet. App. A12-A13), Leati and Lombardfin took a series of steps to conceal their participation in the St. Joe purchases by submitting a misleading affidavit and falsified records of trades to the Commission. Having gone to such lengths to cover up their illegal activities, petitioners may not call upon this Court to set aside the concurrent findings of the courts below that publication notice was sufficient.

ernment and other foreign governments that will give the agency greater access to information during investigations of alleged securities violations.[11] As a result, the Commission will more readily be able to identify the beneficial owners of accounts in foreign financial institutions and will be significantly less likely to require publication notice as a means of securing personal jurisdiction.

d. Finally, even if the legal issue presented otherwise deserved further review, this case is not an appropriate vehicle for doing so, since, in any event, petitioners are not ultimately entitled to prevail on the merits of their constitutional challenge. The Commission moved in the court of appeals to supplement the record or, in the alternative, for a remand to the district court, so that it could present evidence showing that in 1982, shortly after the publication, a copy of the Summons with Notice had been retrieved from the Lombardfin files by one of Leati's former business partners. See C.A. SEC Supp. App. 16-22.[12]

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[11] See Memorandum of Understanding Between the United States and Switzerland to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading, 22 I.L.M. 1 (1982); Memorandum of Understanding Between the United States Securities and Exchange Commission and the Ontario Securities Commission, the Commission des Valeurs Mobiliers du Quebec, and the British Columbia Securities Commission (Jan. 7, 1988); Memorandum of Understanding on Exchange of Information Between the United States Securities and Exchange Commission and the United Kingdom Department of Trade and Industry in Matters Relating to Securities and Between the United States Commodity Futures Trading Commission and the United Kingdom Department of Trade and Industry in Matters Relating to Futures (Sept. 23, 1986); Memorandum of Understanding Between the United States Securities and Exchange Commission and the Securities Bureau of the Japanese Ministry of Finance on the Sharing of Information (May 23, 1986).

[12] The Commission was obliged to make that motion because petitioners elected to challenge the district court's exercise of personal

Petitioners did not dispute the evidence proffered by the Commission. The court of appeals nonetheless found it unnecessary to consider this material in order to resolve the jurisdictional issue in the case, and it therefore denied the Commission's motion to supplement or remand. See Pet. App. A18 n.6. If, however, the constitutional issue is not disposed of on the ground that the court of appeals reached, it would be necessary to reach the question of actual receipt of the published notice, and the Commission would be entitled to prevail on the basis of the proffer that it made in the court of appeals.

2. Petitioners ask (87-1321 Pet. 22-24; 87-1368 Pet. 5-9) the Court to decide the question whether trading in securities of a target company while in possession of material nonpublic information misappropriated from a tender offeror (here, Seagram) is beyond the scope of Section 10(b) of the Exchange Act and Rule 10b-5.[13] They

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jurisdiction directly in the court of appeals, rather than move to reopen the district court proceedings by a post-trial motion under Fed. R. Civ. P. 60(b). For that reason, the Commission was unable to complete the record in the district court on the jurisdictional challenge.

[13] We believe that this Court should decline, in any event, to consider the petition in No. 87-1368. As the court of appeals observed (Pet. App. A21), the petitioning Panamanian corporations are merely alter egos of Tome, who remains a fugitive from justice on related criminal securities fraud charges (*id.* at A4, A66). This Court has held that a fugitive may not invoke the jurisdiction of an appellate court to review his conviction, because evading the law "disentitles the defendant to call upon the resources of the [c]ourt * * *." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970). See also *United States* v. *Sharpe*, 470 U.S. 675, 681 n.2 (1985). The courts of appeals have extended this principle to fugitives' appeals taken in related civil cases. See, *e.g.*, *United States* v. *$45,940 in United States Currency*, 739 F.2d 792, 797 (2d Cir. 1984); *Conforte* v. *Commissioner*, 692 F.2d 587 (9th Cir. 1982), stay denied, 459 U.S. 1309 (1983) (Rehnquist, Circuit Justice) (noting this Court's practice of denying petitions for certiorari where

contend (87-1321 Pet. 22-23; 87-1368 Pet. 5-6, 7-9) that this Court's decision in *Carpenter* v. *United States*, No. 86-422 (Nov. 16, 1987), expressly left that question open and that this case is an appropriate vehicle for resolving the issue. That contention is mistaken for three reasons.[14]

First, petitioners did not challenge the misappropriation theory in the court of appeals, and thus they did not give that court an opportunity to reexamine its prior decisions upholding liability in cases such as this. Accordingly, the claim is not properly presented for review by this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788, n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Second, petitioners are not correct in suggesting that the present case involves the same issue on which the Court was equally divided in *Carpenter*. The question in *Carpenter*, as the Court put it (slip op. 5), was whether Rule 10b-5 was violated when a " 'newspaper is the only alleged victim of fraud and has no interest in the securities traded.' " The Court noted that in *Carpenter* the newspaper, which was "the victim of the fraud," was not a

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courts of appeals have applied *Molinaro* to a civil case). The court of appeals in the present case refused, without explanation, to apply that principle to the Panamanian corporations in this case (see Pet. App. A4 n.1). In our view, however, Tome should not be permitted to invoke the jurisdiction of this Court indirectly through his petitioning alter ego corporations at the same time that he is flouting the processes of law in a related criminal proceeding.

[14] In passing, petitioner Leati also suggests (87-1321 Pet. 23 n.21) that Tome never told him about the forthcoming tender offer by Seagram, and professes (87-1321 Pet. 24 n.23) that he had no idea that Tome had breached a duty of trust or confidence to Seagram or Bronfman. The district court found otherwise, however (see Pet. App. A55-A58, A73), and the court of appeals upheld those findings (*id.* at A9). Petitioner does not contend that the district court's findings are clearly erroneous.

"buyer or seller of the stocks traded in or otherwise a market participant" (*id.* at 4). By contrast, Seagram, the company from which petitioners misappropriated information concerning the impending tender offer, was decidedly "a market participant" and had a significant "interest in the securities traded." The law governing petitioners' misconduct is thus hardly "uncertain" (87-1368 Pet. 8); indeed, this Court has twice declined review in cases that upheld liability under Rule 10b-5 for trading while in possession of material nonpublic information misappropriated (directly or indirectly) from a tender offeror. See *United States* v. *Newman*, 664 F.2d 12 (2d Cir. 1981), aff'd after remand, 722 F.2d 729 (2d Cir.), cert. denied, 464 U.S. 863 (1983); *SEC* v. *Materia*, 745 F.2d 197 (2d Cir. 1984), cert. denied, 471 U.S. 1053 (1985). No court has held to the contrary.

Third, petitioners' conduct clearly falls within the proscriptions of the federal securities laws. Section 10(b) prohibits the use, "in connection with the purchase or sale of any security," of "any manipulative or deceptive device or contrivance" in violation of rules promulgated by the Commission. Rule 10b-5 in turn prohibits "any person" from engaging in "any act [or] practice" that "operates or would operate as a fraud or deceit upon any person" in connection with the purchase or sale of securities. This Court has consistently construed these provisions broadly, noting that Section 10(b) is "a 'catchall' clause to enable the Commission 'to deal with new manipulative or cunning devices.' " *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 203 (1976) (brackets omitted). The Court has emphasized that the statute and rule "are obviously meant to be inclusive." *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972). See generally *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 386 (1983); *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979). See also S. Rep. 792, 73d Cong., 2d

Sess. 6 (1934). And, since trading while in possession of information stolen from a tender offeror concerning an impending tender offer plainly "touches" both the offeror's purchase of securities in the tender offer and the wrongdoer's own trading (*Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12-13 (1971)), there is no doubt that the "in connection with" requirement of Section 10(b) and Rule 10b-5 is satisfied. Petitioners offer no reason whatever why the broad proscriptions of the securities laws do not cover their misconduct.[15]

3. Petitioners claim (87-1321 Pet. 24-27; 87-1368 Pet. 9-16) that the district court lacked the authority to require them to disgorge their illegal profits. That contention does not warrant further review. Every court that has considered this issue has agreed that, in an enforcement action brought by the Commission, federal courts possess the equitable power to require defendants to disgorge wrongfully obtained profits. See, *e.g.*, *SEC* v. *Wencke*, 783 F.2d 829, 837 n.9 (9th Cir. 1986), cert. denied, No. 85-1896 (Oct. 6, 1986); *SEC* v. *Blavin*, 760 F.2d 706 (6th Cir. 1985); *SEC* v. *Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *SEC* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 102 (2d Cir. 1978); *SEC* v. *Texas Gulf*

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[15] In the report accompanying the Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264, the House explained that "[i]n other areas of the law, deceitful misappropriation of confidential information by a fiduciary * * * has consistently been held to be unlawful"; it added that Congress "has not sanctioned a less rigorous code of conduct under the federal securities laws." H.R. Rep. 98-355, 98th Cong., 1st Sess. 5 (1983) (footnotes omitted). Indeed, this Court has twice suggested that trading on " 'misappropriate[d] or illegally obtain[ed] information' "—the activity in which petitioners engaged—may constitute fraud in violation of Rule 10b-5. *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 313 n.22 (1985) (citation omitted); *Dirks* v *SEC*, 463 U.S. 646, 665 (1983).

Sulphur Co., 446 F.2d 1301 (2d Cir.), cert. denied, 404 U.S. 1005 (1971).[16]

Petitioners assert (87-1321 Pet. 27; 87-1368 Pet. 11, 13-15), however, that disgorgement is not available in this case, because it is only intended to make restitution to private investors and no such private investors have a valid action for restitution on the facts of this case.[17] Petitioners misapprehend the purpose of the disgorgement remedy. The primary purpose of disgorgement is to deprive the wrongdoer of his ill-gotten gain (*SEC* v. *Blatt*, 583 F.2d at 1335). Thus, as the Sixth Circuit explained in the *Blavin* case, "[o]nce the Commission has established that a defendant has violated the securities laws, the district court possesses the equitable power to grant disgorgement without

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[16] The Ninth Circuit's decision in *United States* v. *Parkinson*, 240 F.2d 918 (1956), is not to the contrary. That case involved an action by the Food and Drug Administration to enjoin the defendants from introducing certain misbranded drugs into interstate commerce. In an alternative holding (see *id.* at 919), the court of appeals ruled that the district court lacked jurisdiction under the applicable statutes to order the defendants to make restitution to purchasers of their product. The *Parkinson*, case, however, does not address the authority of a district court to order disgorgement in an SEC enforcement action. On that issue, the Ninth Circuit's more recent decision in *SEC* v. *Wencke*, 783 F.2d at 837 n.9, states plainly that "courts may require disgorgement of diverted assests in securities fraud actions."

[17] The Commission rejects petitioners' premise that persons who traded with the defendants lack a cause of action for damages under the securities laws. In the Commission's view, such persons are defrauded investors who may bring actions under Sections 10(b) and 14(e) of the Exchange Act and SEC Rules 10b-5 and 14e-3. To the extent that *Moss* v. *Morgan Stanley, Inc.*, 719 F.2d 5 (2d Cir. 1983), cert. denied, 465 U.S. 1025 (1984), holds to the contrary with respect to Section 10(b) and Rule 10b-5, the Commission believes that case to be wrongly decided. The tender offeror, from which the information was stolen, may also have a claim for damages under the federal securities laws.

inquiring whether, or to what extent, identifiable private parties have been damaged by [the] fraud" (760 F.2d at 713).[18]

Finally, this Court's decision in *Tull* v. *United States*, No. 85-1259 (Apr. 28, 1987), does not require a different result. In the *Tull* case, the Court held that the Seventh Amendment guarantees a jury trial to determine liability in actions by the government seeking civil penalties under the Clean Water Act, 33 U.S.C. 1251 *et seq.* There is no indication that the Court's "passing reference" (Pet. App. A24 n.7) in the decision to disgorgement—noting (*Tull*, slip op. 11) that it "is a remedy only for restitution"—was intended to alter the well-established principle that disgorgement is an equitable remedy that is routinely available in an SEC enforcement action.[19]

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[18] Moreover, even if the disgorged funds were to revert to the United States Treasury, there would be nothing "punitive" (87-1368 Pet. 12) about the disgorgement order, since the disgorgement in this case was limited to the amount of petitioners' unjust enrichment—their illegal profits plus interest.

[19] Leati's and Lombardfin's reliance on what the federal securities laws do *not* say (87-1321 Pet. 25) is misplaced, since they can point to no express statutory prohibition of disgorgement. Cf. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970) (the Court "cannot fairly infer from the Securities Exchange Act of 1934 a purpose to circumscribe the courts' power to grant appropriate remedies"). Indeed, Congress endorsed the well-established remedy of disgorgement in enacting the new civil penalties under the Insider Trading Sanctions Act in 1984. There, the House Report made it plain that civil penalties were to be in addition to the disgorgement of illegal profits. See H.R. Rep. 98-355, 98th Cong., 1st Sess. 8 (1983). Petitioners' further contention (87-1321 Pet. 26-27)—that the authority of the federal courts to enforce the securities laws should be narrowly construed—ignores the long-standing principle that the securities statutes must be interpreted in a manner to accomplish their congressional purpose " 'to make [securities] regulation and control reasonably complete and effective' " (*Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 386 (1983) (quoting 15 U.S.C. 78b)), and to deter future wrongdoing (*Randall* v. *Loftsgaarden*, No. 85-519 (July 2, 1986), slip op. 15-16).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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